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No. 06-278

IN THE

Supreme Court of the United States

DEBORAH MORSE, ET AL., *Petitioners,*

v.

JOSEPH FREDERICK, *Respondent*

On Writ of Certiorari to the United States Court of Appeals For the Ninth Circuit

BRIEF FOR THE DRUG POLICY ALLIANCE AND THE CAMPAIGN FOR NEW DRUG POLICIES AS *AMICI CURIAE* SUPPORTING RESPONDENT

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STATEMENT OF INTEREST*

The Drug Policy Alliance (DPA) is dedicated to broadening the public debate over drug use and regulation and to advancing realistic policies, grounded in science, compassion, public health, and respect for human rights. A non-profit, non-partisan organization with more than 20,000 members and active supporters nationwide, the Alliance has played a central role in the movement for drug law reform in this country, raising public awareness of the inadequacies of current measures and identifying and galvanizing support for promising alternatives.

The Alliance has a core, abiding commitment to preventing adolescent substance abuse and assuring that young people who develop drug problems receive proper assistance. In recent years, the Alliance has worked with government officials, parents' groups, and experts to develop effective and realistic prevention strategies and advocate for proven interventions.

The Campaign for New Drug Policies (CNDP) is a non-profit organization devoted to reforming State policies toward illicit drugs, with an emphasis on healthcare responses to drug-related problems. A forerunner organization, Americans for Medical Rights (AMR), now a project of CDNP, was chartered to advocate for the legal, medical use of marijuana, and through their advocacy efforts, CNDP and AMR have advanced enactment of ballot measures in 12 States and the District of Columbia.

As participants in the earnest and often emotionally-charged debate about drug policy reform – and frequent critics of government policies and enforcement efforts – *Amici* are deeply concerned that this case be decided consistently with the First Amendment's core commitment to public discussion

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*The parties have consented to the filing of this brief. It was not authored in any part by counsel for a party, and no one other than *Amici* and their counsel made a monetary contribution for its preparation or submission.

SUMMARY OF ARGUMENT

Although the incident giving rise to this case may seem trivial, the First Amendment principles that have now been drawn into question are not. In an effort to uphold punishment imposed here for Respondent's nondisruptive expression in a public forum, Petitioners advance a fateful First Amendment argument: that because federal law proscribes marijuana, any expression that might have the effect of weakening its audience's compliance with the statutory prohibition – whether a "BONG HiTS 4 JESUS" banner, one that says "legalize marijuana," or one that lays out a more elaborate case against existing law – is punishable based on these "bad tendencies."

This theory has been decisively repudiated by this Court before and must be here. As landmark opinions have explained, a "bad tendencies" rule systematically disadvantages those who criticize existing laws, thereby entrenching the unexamined status quo, and it has no place in a system of government based on popular sovereignty and public discussion. This realization, however, did not come easily; the theory has a long and notorious history – and was at the center of the bitter controversies over the right to speak against slavery that helped impel the Nation toward Civil War.

The commitment to resolving matters through open public debate – and appreciation for the dangers of viewing speech suppression as an auxiliary means of law enforcement – are of central relevance to the subject matter of this case. In recent years, citizens across the country have been engaged in a serious, robust and wide-ranging discussion about the Nation's present approach to drug use and abuse. Voters and legislators have debated whether marijuana possession should remain regulated under the criminal law; whether laws should exempt drug use for medical or religious purposes; whether laws mandating lengthy sentences for nonviolent offenders are sensible and fair; whether rules impeding the availability of effective pain medications to individuals with chronic and

intractable pain should be changed; and whether the need to combat infectious disease warrants changing laws intended to prevent drug users from obtaining sterile syringes. Many of these measures have been enacted, often with broad citizen support, typically over the vocal opposition of government authorities, and almost always after long and intense debate.

This is not the occasion to argue the merits of the reform positions on various policies, but rather to highlight the radical incompatibility of Petitioners' position with the Constitution's core commitment to open debate. When policy reforms are discussed, opponents in law enforcement invariably claim that measures will have unintended consequences and weaken compliance with other laws. To date, however, such claims, advanced in the forum of public opinion, have been subject to scrutiny and counter-argument. Under a "bad tendencies" theory, assertions that have been matters for disproof or rebuttal become a valid basis for silencing the disfavored speech.

Nor is this danger particular to debates over drug control laws. Those who seek to change laws outlawing physician-assisted suicide, gun controls, or constitutional abortion protection necessarily believe – and seek to persuade others – that the existing laws are unwise or unjust. Petitioners' theory would have condemned advocacy of the 21st Amendment as readily as it condemns present reform proposals.

To be sure, the expression in this case – a banner bearing words whose precise meaning remains elusive – was not a closely reasoned law reform argument. The logic of Petitioners' position does not admit a distinction on that basis. On the country, a statement cogently laying out scientific data inconsistent with the government's harm message could have a greater effect than did Frederick's banner display as presumably would a "legalize marijuana" banner exhibited by a revered recent JDHS graduate. Indeed, the United States as *Amicus* does not shy away from this implication, and expressly disavows any suggestion that political advocacy should be

exempt from tendency-based suppression.

Petitioners do not claim here that government could punish the speech by non-student advocates of drug policy reform. Rather, citing *Tinker* and *Fraser*, they claim authority "only" to stop public high school students from speaking on the government-disfavored side of this debate. By their own terms, those decisions rest exclusively on the need to adapt First Amendment rules to the special circumstances of the public school environment – not, as Petitioners suggest, that the freedom of belief and expression the Amendment protects do not attach until the age of majority. Both history and precedent rebel against that claim. Students have been active participants in urgent national debates over war and civil rights, as they are in the discussion of drug policy reform, and, given their distinct perspective on many of the most important issues, society has a strong interest in hearing from them.

The rules announced in *Tinker* and *Fraser* simply have no application to Frederick's First Amendment claims because, as we argued (unsuccessfully) as *amicus curiae* below, Respondent was not speaking as a student in a school-provided forum. He was addressing the public from a public sidewalk, a forum where, under this Court's precedents, freedom of expression is given its most comprehensive protection. There is no question that if any of the other people standing in that same place had displayed an identical banner, any attempt to suppress *their* speech would be judged – and condemned – under an undiluted strict scrutiny standard. There is no valid First Amendment reason why Frederick, present with them by right, wholly independent of his status as a public high student – could more readily be silenced.

But even if the Court were to allow Petitioners' actions an exception from the ordinary rules governing censorship in a public forum, the "school speech" decisions recognize no permissible basis for the punishment here. Contrary to Petitioners' rereading, *Tinker* and *Fraser* recognize that

suppressing speech based on disapproval of the idea expressed – viewpoint discrimination – to be no less serious "inside the schoolhouse gate" than outside. As this Court's landmark public school First Amendment decision, *West Virginia Bd. of Educ. v. Barnette*, makes clear, whether or how "central" Petitioners' drug prevention is to their "mission" does not control; school authorities' unquestioned power to teach students about the dangers of illegal drugs or the dangers of global warming – does not include the power to suppress expression by students who believe otherwise.

While Petitioners and *Amici* call the Court's attention to the vastness, complexity and seriousness of the problem of youth drug abuse, implying that adherence to First Amendment principles – the remedy for speech is "more speech" – in these circumstances would be an unaffordable luxury, any such "special needs" exception should be rejected. There are strong reasons for adhering to First Amendment doctrine – developed in war, civil emergency, and upheaval – in any circumstances, but the conflict posited here is not authentic. No searching scrutiny is needed to see that the only purpose the power Petitioners' claim can *actually* serve is as a signal of the steadfastness of their commitment to the anti-drug cause; it bears no reasonable relationship (save for, perhaps, an inverse one) to actual drug abuse prevention. Whether or not "pro-drug" messages "lead to" drug abuse and even if Respondent's inscrutable banner could be so described, the government would have scant authority to suppress other, similar (or more "incendiary") *banners* visible to these high school students, and none at all to interfere with the many other messages that Petitioners themselves acknowledge "bombard" teenagers.

Under First Amendment law, the patent inefficacy of censorship in advancing the governmental interest settles its unconstitutionality. But the reasons for rejecting Petitioners' argument are not confined to its First Amendment dangers. At least as important, censorship here is a profoundly bad drug

abuse prevention strategy. To legislators, school authorities, and parents concerned about youth drug abuse, every message the government can send that drugs are harmful and every contrary one it can suppress may seem a step in the right direction, but experience belies that intuition. Because schools cannot talk to students through a "closed circuit"; because students receive so much other drug-related information, an alarmist approach, which lacks candor and credibility, does not work.

This case, however, is not about what public school authorities should or may say – but rather what they may suppress, and a "drug abuse prevention" policy that aims to inhibit students from expressing what they actually know, believe, or think about drug-related matters, in favor of what the government wants to hear, is doomed.

ARGUMENT

I. The Constitution Requires and The Nation Benefits From Open and Unhindered Discussion of Drug Policy Reform

A. The "Bad Tendency" Theory of Censorship Offends Constitutional First Principles

Although the Briefs of Petitioners and their *Amici* repeatedly describe this case as involving punishment for "advocating" violation of the federal drug laws, see Pet. Br.8, the expression in this case bears no resemblance to the speech that has given rise to this Court's incitement case law, see, *e.g.*, *NAACP v. Claiborne Hardware*, 458 U.S. 886, 928 (1982); *Bond v. Floyd*, 385 U.S. 116 (1966), and the theory of censorship they assert goes far beyond what has been held permissible even in those circumstances.[1] Frederick's expression – a banner bearing a cryptic message that *Petitioners* have described as a "whimsical espousal[] of illegal drug use"

[1]The Court has held that speech unequivocally advocating unlawful action is protected, subject to a narrow and stringent set of exceptions. See *Brandenberg v. Ohio*, 395 U.S. 444, 447 (1967) (unlawful action must be serious, imminent, and highly likely).

and "at best * * * a parody of the seriousness with which the school takes its mission to prevent use of illegal drugs." C.App.Br. at 21 – was "incitement" only in the sense that "[e]very idea is an incitement," *Gitlow v. New York*, 268 U.S. 652, 673 (1925) (Holmes, J., dissenting).

What Petitioners here call "illegality promot[ion]," Br. 15, reduces to a claim that (1) marijuana use is prohibited under federal law; (2) Frederick's inclusion of a slang and seemingly sympathetic drug reference is at odds with that law's underlying premise, *i.e.*, that drug use is "harmful and wrong," and (3) statements of this character could comfort those who might smoke marijuana, in violation of the prohibition. That Respondent did not intend the message to incite others to unlawful action, Petitioners maintain, does not diminish their power to suppress it, nor would it matter that the banner contained a more explicitly political appeal or only truthful, factual information.[2]

The idea that government officials are empowered to punish expression on these broad terms has a long history, see CURTIS, FREE SPEECH, "THE PEOPLE'S DARLING PRIVILEGE": STRUGGLES FOR FREEDOM OF EXPRESSION IN AMERICAN HISTORY (2000) 10-12, but it is one whose dangers to core constitutional values this Court has come to emphatically repudiate.

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[2] As the efforts of the parties and courts below make clear, divining what the message meant is no easy matter; apparently, many who observed the banner in January 2002 found it unintelligible. But there is agreement that Frederick's intended audience were those watching on television. Pet. App. 62a – *not* the high school students whose noncompliance with the law he is charged with "inciting," and the only "effect" Petitioners have even attempted to connect to the banner was an instance of pro-drug *graffiti*.

For his part, Respondent testified that inclusion of a reference to drugs (as against some other controversial topic) was in some sense fortuitous. The primary purpose of the exercise, he explained, was to "reassure myself that this is America. I have a Bill of Rights. I have the right to do something, whether [] somebody finds it offensive or somebody doesn't agree with it."

Punishing those who criticize laws is contrary to what Justice Jackson described as the "American concept of the State," – "where [a]uthority * * * is to be controlled by public opinion, not public opinion by authority," *Barnette*, 343 U.S. at 641. It gives would-be censors vast power, see, *e.g.*, *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 580 (2001) (Thomas, J., concurring in part) ("if speech may be suppressed whenever it might inspire someone to act unlawfully, then there is no limit to the State's censorial power"), and, because every "denunciation of existing law tends in some measure to increase the probability that there will be violation of it," *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring), it operates to the systematic disadvantage of those seeking to persuade fellows citizens to change the status quo. See *Roth v. United States*, 354 U.S. 476, 484 (1957) (the First Amendment "was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people").

As Judge Kleinfeld's opinion below was quick to recognize, this theory does not limit itself to speech critical of the Nation's *drug* laws. What *Washington v. Glucksberg*, 521 U.S. 702 (1997), described as the "earnest and profound debate about the morality, legality, and practicality of physician-assisted suicide," *id.* at 735, has unfolded in an environment where criminal prohibition is almost universal, *id.* at 711-16, and the recognition that this "debate [should] continue * * * in a democratic society," *id.* at 735 was made with full awareness that such discussion – by exposing apparent weaknesses in the justifications for current prohibitions – could lead to noncompliance. The same might be said about arguments that federal gun control laws violate the Second Amendment; arguments against federal abortion clinic access statutes; those favoring repeal (prior to *Lawrence v. Texas*, 539 U.S. 558 (2003)) of laws criminalizing homosexual sodomy; or the 1932 Democratic Party platform's condemnation of national alcohol prohibition. See KYVIG, REPEALING NATIONAL PROHIBITION

(2000) at 157.[3] And *Tinker* upheld expression that might readily have been described as "advocating" noncompliance with the law requiring military service. Cf. U.S. Br. 7. Indeed, virtually every basis for arguing that a law should be changed – that it is unjust, philosophically unsound, that it violates the Constitution or some other, higher law, that it is hypocritically or haphazardly enforced – can be said to affect some listener's readiness to comply.

While the wrongness of the "bad tendencies" theory seems so self-evident as to make such dangers seem only theoretical, the judicial opinions famed for exposing its errors were dissents and concurrences, delivered at a time not long after the Court upheld the conviction of Charles Schenck, for sending a flyer to World War I era draftees with the Thirteenth Amendment printed on one side and a denunciation of war printed on another, see 249 U.S. 47 (1919), and when

> Citizens were sentenced to prison terms for telling a woman who was knitting socks for soldiers that no soldier would ever see them * * * for urging broader exemptions for conscientious objectors * * * and for circulating a pamphlet arguing that Christ's principles condemned war.

CURTIS, FREE SPEECH at 390 (summarizing cases collected in CHAFFEE, FREE SPEECH IN THE UNITED STATES (1941)).

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[3]The Court of Appeals made a similar point in rejecting Petitioners' claimed power to punish "mission-undermining" speech.

> All sorts of missions are undermined by legitimate and protected speech – a school's anti-gun mission would be undermined by a student passing around copies of John R. Lott's book, *More Guns, Less Crime*; a school's anti-alcohol mission would be undermined by a student e-mailing links to a medical study showing less heart disease among moderate drinkers than teetotalers; and a school's traffic safety mission would be undermined by a student circulating copies of articles showing that traffic cameras and automatic ticketing systems for cars that run red lights increase accidents.

Pet.App.11a (footnote omitted).

These wartime prosecutions do not represent an historical aberration or even the high water mark of the "bad tendencies" theory. During the middle decades of the Nineteenth Century, Southern States relied on an increasingly aggressive version of the theory to thwart expression of anti-slavery opinion and prevent debate over even modest measures, on the theory that such discussion tended to undermine bondsmen's acceptance of their "lawful" lot. See CURTIS at 260-99; see also GRABER, DRED SCOTT AND THE PROBLEM OF CONSTITUTIONAL EVIL 232-34 (2006); W. MILLER, ARGUING ABOUT SLAVERY (1996). This suppression provoked outrage in the North, where accusations that principles of republican government had been supplanted by "Slave Power," and these crises over free speech fueled hostilities that took the Nation into Civil War.

B. The Current Discussion Of Drug Policy Reform Is Tied Inextricably to Principles of Self-Government

These experiences and lessons have resonance in this case. As this Court's recent decisions give some indication, the wisdom, justice, and efficacy of our Nation's drug laws is the subject of a thoughtful, robust debate at every level of government and throughout the country. See *Gonzales v. Raich* 545 U.S. 1, 42 (2005) (O'Connor, J, dissenting) (describing California's Compassionate Use Act as "exemplif[ying] the role of States as [policy] laboratories" pursuing "novel social and economic experiments). A non-exhaustive count identified more than 150 notable reforms enacted at the State level alone (in 46 different States) between 1996 and 2002 – 17 of which became law by voter initiative. See Drug Policy Alliance, *State of the States, Drug Policy Reforms: 1996-2002* (2003). The number of changes at the local government level is far larger, and many measures that did not become law garnered large citizen and legislative support. These continue.[4]

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[4]Petitioners' *Amici* are profoundly wrong to imply (D.A.R.E.Br.18 n.32) that these developments are inconsequential, because marijuana remains federally prohibited. Although State measures yield in instances of conflict,

In addition to measures removing State law barriers to medically-recommended marijuana, States have enacted measures reforming mandatory minimum sentencing laws, making drug treatment more widely available, removing barriers to effective pain medications for those suffering from intractable pain, see, *e.g.* Cal. Health & Safety Code § 124960(d),[5] and modifying laws relating to sterile syringes, *e.g.*, Rev. Code Wash. § 69.50.412(5); see "Lawmakers OK Clean-Needle Bill," *Newark Star-Ledger* (Dec. 12, 2006) (describing New Jersey legislation culminating "more than a dozen years and countless hours of impassioned debate," explaining that "[f]or 13 years, lawmakers have wrestled with the legal and moral paradox of giving addicts syringes to use illicit drugs," but that "scores of scientific studies," cited by proponents had eventually carried the day).

Many of these measures have been enacted by popular initiative, with millions of Americans casting ballots on the reform side – with many prominent elected officials and medical and public health organizations spearheading support for reforms. Millions of citizens have also voted or spoken

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U.S. Const art. VI, States are sovereigns, and whether their non-preempted laws proscribe or permit conduct is of vast legal and practical significance. In addition, the censorship here was imposed by those acting under color of Alaska, not federal, law, and that State has recognized a fundamental right to marijuana use by adults (including 18 year-old high school students like Frederick) in the privacy of the home. Cf. *Lorillard*, 533 U.S. at 564 (First Amendment analysis must take account that products advertised were legal for adult use)

Through a broader lens, discussion and experience at the State level can profoundly affect changes in federal law. See, *e.g.* KYVIG, REPEALING NATIONAL PROHIBITION at 68-69 (describing importance of State-level referenda condemning Prohibition as precursors to 21st Amendment).

[5]Indeed, these particular reforms – result of efforts by maverick health professionals who endured insults that they were no better then "drug pushers" – have come to play a central role in the debate over physician-assisted suicide. See, *e.g.*, 521 U.S. at 747 (Stevens, J., concurring in judgment) ("Encouraging the development and ensuring the availability of adequate pain treatment is of utmost importance").

against these reforms, cf. *Raich*, 545 U.S. at 57 (O'Connor, J., dissenting) (observing that "If I were a California citizen, I would not have voted for the medical marijuana ballot initiative") – and in many places, they have encountered outspoken opposition from government officials (and federal law enforcement authorities, especially), who frequently claim that any step away from prevailing approach undermines the law's anti-drug "message."[6]

Alaska, as Judge Kleinfeld's opinion noted, has been the locus of one the most intense and long-running of these citizen debates. See Pet.App.6a n.4 (explaining that "[m]essages about marijuana have a degree of political salience" there). By the time Frederick unfurled his banner, Alaskans had been arguing with one another about the legal status of marijuana for more than a quarter century. The State Supreme Court's decision in *Ravin v. State*, 537 P.2d 494 (1975), holding that criminal punishment for possession of a small amount of marijuana in one's home violated the State Constitution's right to privacy prompted a repeal effort that included failed constitutional amendments and a successful – but ultimately ineffectual – ballot initiative, see *Noy v. State*, 83 P.3d 545 (Alaska Ct. App. 2003). In 1998, the year Frederick entered high school, Alaskans debated and approved a medical marijuana ballot measure, and two years after that, the State's voters were presented – and rejected – a sweeping decriminalization ballot measure. See Verhovek, "Alaska's Voters to Decide On

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[6]Thus, last Term, in *Gonzales v. O Centro Espirita Beneficente U.D.V.*, the United States argued that a RFRA exemption would "increase] public familiarity with hoasca, * * * generat[e] public misperceptions about the safety of DMT tea, and fuel[] the development of a market for hoasca," Pet. Br. No. 04-1084 at 40 n.30. And the official ballot pamphlet, "Argument Against [California] Proposition 215" asserted that it would "damage * * * efforts to convince young people to remain drug free. It sends our children the false message that marijuana is safe and healthy." See also Partnership for A Drug-Free America, *The Wrong Message of Legalizing Illicit Drugs* (Aug. 18, 1994) ("Legalization sends [a] message * * * erodes the anti-drug attitudes of our youth and [encourages] them to try and use illegal drugs").

Legalizing Marijuana," *N.Y. Times* (Oct. 10, 2000).

It would be mistaken to observe that the enigmatic message on the banner was not a closely reasoned argument for law reform and that its suppression poses no threat to more earnest appeals. The First Amendment's limitations are not limited to speech by "philosophers," *Texas v. Johnson*, 491 U.S. at 421 (Kennedy, J., concurring); see also *R.A.V. v. St. Paul*, 505 U.S. 377 (1992), and Petitioners' own characterization confirms that *they* discerned a political aspect to the message. See Ct.App.Br.21 (calling banner "at best, a parody of the seriousness with which the school takes its mission to prevent use of illegal drugs" and describing Frederick as deserving of punishment for "belittl[ing]" administrators' pursuit of their "critical [anti-drug] mission"); *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964) (restraints on "criticism of government and public officials are [inconsistent] with the First Amendment"); see also Pet.App.6a n.4 (noting that statements about marijuana "might be understood as political advocacy").

Even more important, the logic of Petitioners' position does not suggest a distinction between "whimsical" banners and those which lay out a reasoned case for drug reform. On the contrary, if potential to "undermine" the government's anti-drug message is the source of the power to censor, it is unimaginable that a banner urging that voters "legalize marijuana" in the next election would be protected – or a pamphlet that summarized the Institute of Medicine's findings that "marijuana users appear to be less likely to [become dependent] than users * * * of alcohol and nicotine[], and marijuana dependence appears to be less severe than dependence on other drugs"; that "marijuana use * * * does not appear to be a gateway drug to the extent that it is the cause or even * * * the most significant predictor of serious drug abuse," or that report's rejection of the view that "because [marijuana] is an illegal substance, * * * any use of marijuana [is] substance abuse." See MARIJUANA AND MEDICINE: ASSESSING THE SCIENCE BASE (1999) ("IOM

REPORT") 86, 98, 101. A speech referencing this Court's recent observation that allowing peyote use by Native American Church members belied the government's assertion that "any Schedule I substance is in fact always highly dangerous in any amount no matter how used," *O Centro*, 126 S. Ct. 1211, 122 (2006), would be suspect – as would one referencing the U.S. Sentencing Commission's observation that "the negative effects from prenatal exposure to cocaine are very similar to those associated with prenatal tobacco exposure and less severe than the negative effects of prenatal exposure to alcohol," *Report to the Congress: Cocaine and Federal Sentencing Policy* 100 (2002) –or one reading from a recent *Juneau Empire* editorial entitled, "Think Outside The Box, Decriminalize Marijuana" declaring that "the reality is that Prohibition did not work and the effort to stamp out marijuana is not working either." Despite all the government's efforts, it is available to just about anyone, in any part of the nation." (Jan. 1, 2007).

These are not "slippery slope" concerns: "[t]his wolf comes as a wolf," *Morrison v. Olson*, 487 U.S. 654, 699 (1988) (Scalia, J., dissenting). Rather than suggest that expression more explicitly addressing a political matter, such as a drug legalization ballot initiative, would somehow be exempted, despite its "drug promoting" tendencies, the United States asserts (Br. 27) "'legalize' is not a magic word that clothes speech advocating drug use from school discipline. And students do not have a First Amendment right to display 'legalize marijuana' *banners* * * * at events like the one at issue here") (emphasis in original); compare *ACLU v. Mineta*, 319 F. Supp. 2d 69, 78 (D. D.C. 2004) ("a government regulation that directly placed prohibitions on speech advocating the legalization of marijuana, but allowed the opposite point of view * * * unquestionably would be unconstitutional").[7]

[7]Although emphasizing "banners" seems to imply that there was something objectionable about the *form* of Frederick's expression, punishment was not imposed pursuant to a "no banners" policy, but rather an anti-drug policy.

There is no reason to expect that government officials would be reluctant to wield the "bad tendencies" theory against reform arguments. As noted above, law enforcement authorities opposing drug law reforms in the political arena almost always do so on the ground that efforts to discourage improper use will be undermined, see n.6, *supra* (collecting examples), or by casting aspersions on the "agenda" of those who criticize the status quo.

But such claims, when made in public debate, may be met with reasoned, evidence-based counterargument. See, *e.g.*, IOM REPORT at 104 (finding "no convincing data to support [the] concern" that permitting medical use of marijuana would lead to an increase of marijuana use in the general population, noting and "no evidence that the medical marijuana debate has altered adolescents' perceptions of the risks associated with marijuana use"); Satcher, *Evidence-Based Findings on the Efficacy of Syringe Exchange Programs* (2000) (Surgeon's General's finding of "conclusive scientific evidence that syringe exchange programs * * * do[] not encourage the use of illegal drugs"); IOM REPORT at 102 (observing that "widespread concern among physicians and medical licensing boards that liberal use of opiates would result in many addicts * * * * [has] proven unfounded; it is now recognized that fear of producing addicts through medical treatment resulted in needless suffering among patients with pain as physicians needlessly limited appropriate doses of medications"). Cf. Zernike, "Anti-Drug Program Says it Will Adopt a New Strategy," *N.Y. Times* (Feb. 15, 2001) ("DARE has long dismissed criticism of its approach as flawed or the work of groups that favor decriminalization of drug use. But the body of research had grown to the point that the organization could no longer ignore it. In the past two months alone, both the surgeon general and the National Academy of Sciences have issued reports saying that DARE's approach is ineffective").

II. High School Students Are And Should Be Full Participants In the Policy Discussion

Petitioners' offhand suggestion (Br.19 n.4) that the "marketplace of ideas" protected by the First Amendment is open only to those who have attained the age of majority (a notion that would not augment their power over the 18-year old respondent here), is refuted not only by *Tinker* (which referred to the "First Amendment rights" of the 13, 15, and 16-year olds plaintiffs), but also by *R.A.V.* and *Barnette*.

Whatever may have been the case in England in 1859, constitutional protection – and participation in public affairs – by students of high school age is and long has been the norm on these shores. See *Tinker*; LEVINE, FREEDOM'S CHILDREN 77-92 (1993) (describing 1963 "Children's Crusade" in Birmingham, Alabama). Students have been full and active participants in many recent drug policy debates, – on both sides of the reform position see Stockton, "Marijuana Vote Sparks Passion on Both Sides," *Juneau Empire* (Oct. 25, 1998) (noting that students at Juneau-Douglas High School students had formed "Juneau's Teens Against Ballot Measure 8 [permitting medical use]"); Br. *Amicus Curiae*, Students for Sensible Drug Policy.

Students are distinctly affected by – and distinctly qualified to speak about – a number of drug policies that are the subject of intense debate, see *Earls* (linking high school activities to drug tests); 20 U.S.C. § 1091(r)(1) (denying education aid based on previous drug conviction), and younger people bear especially severe collateral effects of lengthy sentencing laws. BERNSTEIN, ALL ALONE IN THE WORLD: CHILDREN OF THE INCARCERATED (2006); Simmons, *Children of Incarcerated Parents* 3 (Cal. Research Bureau (2000) (nearly 300,000 California children have a parent incarcerated). There is a strong First Amendment interest in assuring that views are heard by those who decide such policies. See *Thornhill v. Alabama*, 310 U.S. 88, 102 (1940) (linking freedom of discussion to "information "appropriate to enable the members

of society to cope with the exigencies of their period"); *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 699 (1990) (Scalia, J., dissenting) (noting nonprofit corporations with "unique views of vital importance to the electorate"); cf. *San Diego v. Roe*, 543 U.S. 77, 80 (2004) (per curiam) (on some issues, "public employees are uniquely qualified to comment").

Indeed, the Briefs of Petitioners and their *Amici* go far in making this case. Accepting the paramount importance of preventing youth drug substance abuse – and the government-documented difficulty of crafting messages that actually advance that interest, see G.A.O., *Rep. No. GAO-03-172R, Youth Illicit Drug Use Prevention: DARE Long-Term Evaluations and Federal Efforts to Identify Effective Programs* 2 (Jan 16, 2003) (finding "no significant differences in illicit drug use between students who received [widely-used drug education program] and students who did not"); G.A.O. Rep. No. 06-818, *Contractor's National Evaluation Did Not Find That the Youth Anti-Drug Media Campaign Was Effective in Reducing Youth Drug Use* (Aug. 25, 2006) (endorsing conclusion that "campaign was not effective in reducing youth drug use, either during the entire period of the campaign or during the period from 2002 to 2004 when the campaign was redirected and focused on marijuana use"), it is deeply irresponsible to ignore what high school students actually think, know, and believe, about the subject, see Brown, *Listen to the Kids: When It Comes to Drug Education, Students Confirm What Research Says*, AM. SCHOOL BOARD J., Dec. 1997, at 40 – or to punish them because officials do not like what they have to say. See Ct.App.Br.21 (asserting that Respondent's "belittl[ing]" administrators' pursuit of their "critical [anti-drug] mission" was punishable).

III. The "Special Characteristics" of The Public School Forum Do Not Supply Authority For Punishing Frederick's Expression of A Government-Disfavored View

Just as this Court's "student speech" cases do not recognize governmental power to punish high school students' free expression based on their age, they do not, as the Court of Appeals acknowledged, rest on their status as enrollees in public-run schools. See Pet.App.5a (unconstitutionality of punishing a "student [for] having an after-school job at a video store that rents out Cheech and Chong tapes [or] * * * driving a car on public streets with a 'Bong Hits 4 Jesus' bumper sticker" is "easy").

Rather, these cases recognize that the Constitution protects students' freedom of belief and expression inside and outside the "schoolhouse gate," *Tinker* 393 U.S. at 506; see also *Barnette*, but that general First Amendment principles must be applied in light of the "special characteristics" of the public school forum, *id.*; see also *id.* at 512 (delimiting permissible grounds for suppressing students' "expressi[ons of] their personal views *on the school premises*") (emphasis added). The Court of Appeals was unassailably correct to hold that these "student speech" cases supply no authority for the viewpoint-based punishment Petitioners imposed; its only error (albeit harmless, under these circumstances) was in understating the extent of First Amendment protection to which Frederick's expression was entitled.

A. Frederick Was Speaking Publicly, As A Citizen, In A Public Forum

Petitioners and *Amici* insist (and the decision below agreed) that, though Frederick was not "on the school premises" when he displayed his banner, it would be error to treat "which side of the street [he] chose to stand on" as "constitutionally dispositive," U.S. Br. 27 – given that the banner was visible to JDHS students across the street, who were present at the Torch Relay under school supervision. Accord Pet.App.6a ("Frederick was a student, and school was in session").

This is wrong. It is of course not uncommon in First Amendment jurisprudence for such variables to have large

weight. See, e.g., *Schenck v. Pro-Choice Network*, 519 U.S. 357, 378-82 (1997); cf. *Burson v. Freeman*, 504 U.S. 191 (1992). But Respondent's entitlement to undiluted First Amendment protection is not based on his expression's occurring far enough away from a public *school*, but rather because of where it did occur: in a public *forum* – indeed, the quintessential such forum, a public sidewalk along a parade route. As legions of this Court's cases instruct, that undisputed fact *is* "constitutionally dispositive": the first task in judging a governmental limitation on expression is to "identify the nature of the forum" in which expression occurs, see, *e.g.*, *Cornelius v. NAACP LDF, Inc.*, 473 U.S. 788, 800 (1985); *Arkansas Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 671 (1998), and if it is held to be "public" in character,"the government's ability to restrict expressive activity is very limited." *United States v. Grace*, 461 U.S. 171, 177 (1984). The Nation's

> tradition of free speech commands that a speaker who takes to the street corner to express his views * * * should be free from interference by the State based on the content of what he says.

Hurley v. Irish-American Gay, Lesbian & Bisexual Group, 515 U.S. 557, 579 (1995). Indeed, this point was highlighted in *Kuhlmeier*: "[t]he public schools do not possess all of the attributes of streets, parks, and other traditional public forums that 'time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions'" 484 U.S. 260, 267 (1988) (quoting *Hague v. CIO*, 307 U.S. 496, 515 (1939)).

Under settled law, the sidewalk's relative proximity to the public high school was immaterial: "public forum property * * * will not lose its historically recognized character for the reason that it abuts government property * * * dedicated to a use other than as a forum for public expression," *Grace*, 461 U.S. at 180; *Boos v. Berry*, 485 U.S. 312 (1988) (applying public forum standards to sidewalks outside foreign embassies).

Nor can the presence in the audience of public high school students, or the fact that they were present at the public event under the school's auspices, make "school speech" rules control. The assembled crowd included many non-students, – Petitioners found the message was intended "for the benefit of television cameras covering the Torch Relay," Pet.App.62a; see *Lorillard*, 533 U.S. at 564. Visits by school groups to this Court or to Boston's St. Patrick's Day parade would not authorize censorship under the standards of the public school setting.[8] Indeed, the "special * * * First Amendment protection," for speech in public fora, *Grace*, 461 U.S. at 180, has never been grounded on the assumption that students of high school (and younger) age do not frequent streets and parks.

These principles control Respondent's Free Speech claim.[9] Because *every other person* standing along side Frederick – including a private school student, a recent graduate, or a recent JDHS drop out – could lawfully have displayed precisely the same banner to the same audience, so too could he. "If the speaker[] here were not [a high school student], no one would

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[8]Under *Hurley*, the presence of students enrolled at a school committed to teaching tolerance and respect would not have supplied a reason for rehabilitating the inclusion mandate the Court struck down, nor could a principal prevent a Boy Scout troop from participating, see *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000) – or punish a student for marching under the Boy Scout Flag. That, in relevant respects, is this case.

Similarly, that Petitioners' responsibility for educating students about nutrition would presumably allow them to exclude sugar-laden soft drinks from the cafeteria, see Center For Science In the Public Interest, *Liquid Candy, How Soft Drinks Are Harming Americans Health* (2005), it would not have allowed them to pull down a Coca Cola banner that sought to associate cola drinking with a healthy lifestyle, on the ground that it was visible to the student audience.

[9]There is a plain, unacknowledged tension between Petitioners' insistence that the Court of Appeals took an insufficiently categorical approach – by noting that the event was privately sponsored and that teacher supervision was, in fact, lax – and their central premise that the Court need not strictly follow its (very categorical) public forum case law in a case involving expression that occurred in a public forum.

suggest that the State could silence [his] proposed speech," *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 784 (1978). See *Rosenberger v. University of Virginia*, 515 U.S. 819, 828 (1995) (principle that "government regulation may not favor one speaker over another" derives from the "axiom[] that the government may not regulate speech based on * * * the message it conveys"). Accord *Police Dept. of Chicago v. Mosley*, 408 U.S. 92 (1972); *Carey v. Brown*, 447 U.S. 455 (1980); *Greater New Orleans Broadcasting Ass'n, Inc. United States*, 527 U.S. 173, 193 (1999) ("[e]ven under the degree of scrutiny that we have applied in commercial speech cases, decisions that select among speakers conveying virtually identical messages are in serious tension with the principles undergirding the First Amendment"); *Cincinnati v. Discovery Network*, 507 U.S. 410, 428 (1993).[10]

Petitioners' attempts to analogize the circumstances here to those of a student on an off-campus class trip fail to reckon with

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[10] That the expression of a student peer is said to be more persuasive than another's (*i.e.*, through "peer pressure" U.S. Br. 17) would not, under usual First Amendment rules, be a permissible ground for a speaker-based restriction, see *Austin*, 494 U.S. at 695 (1990) (Scalia, J., dissenting) (First Amendment does not allow restrictions grounded on the notion that an individual's "speech may be 'unduly' persuasive * * * or 'unduly' respected (because they are clergymen)"), but the issue need not be squarely faced here, because it is simply impossible to describe a *banner*, let alone a delphic one directed at the television audience, as "pressuring" others. Cf. *Board of Educ. v. Earls*, 536 U.S. 822, 841 (2002) (Breyer, J.) (noting that policy gave "adolescents a nonthreatening reason to decline his friend's drug-use invitations").

Nor is there anything "strange" about the "dichotomy" (Pet. Br. 30 n.9) between the decision below and the Fourth Circuit's (pre-*Lorillard*) decision upholding an ordinance limiting the location of alcohol advertising, see *Anheuser-Busch v. Schmoke*, 101 F.3d 325 (4th Cir. 1996). This Court's cases generally give noncommercial speech greater protection than advertising – and while advertising, by definition, "promotes" the product, what Frederick wanted viewers to do is far from clear. Most important, a geographic ban like the one upheld in *Schmoke* applies even-handedly to the same speech – advertising. Here, a hypothetical non-student "Frederick Joseph,"could have taken up the same banner with impunity.

the *reason* why broader First Amendment protection is afforded in the public forum: because citizens are free to speak their minds "'in a place where [they] ha[ve] every right to be,'" *Grace*, 461 U.S. at 184 (Marshall, J., concurring and dissenting in part) (quoting *Brown v. Louisiana*, 383 U.S. 131, 142 (1966)) (Opinion of Fortas, J). Frederick was not trying to speak in a school-created forum, see *Fraser*, 478 U.S. at 677; his presence on the public sidewalk, was, as a matter of fact and law, independent of school authorities. Compare Pet.App.58a (Policy No. 5850) ("Participation in * * * class trips is not a right"). He was present and expressing himself, not as a student – but as a citizen.[11]

B. The Court's "Student Speech" Decisions Do Not Confer Sweeping Powers Of Viewpoint-Based Suppression

Although Respondent's public forum speech is entitled to full protection, the viewpoint-based censorship at issue here fares no better under the First Amendment standards applicable to student speech in the public schools. At the center of

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[11]The Government's suggestion (U.S. Br. 24) that public school students' Free Speech rights be determined under rules applicable to government *employees* likewise ignores critical dissimilarities between the respective legal relationships. First, many public employees' duties include delivering government's *message*, and their effectiveness in doing so can be impaired by what they say elsewhere, see *Davis v. Monroe Bd. of Educ.* (Kennedy, J., dissenting) (noting Court's unanimity "that the school [does not] act[] through its students"); *LSC v. Velazquez*, 531 U.S. 533, 542 (2001) (when government "funds to private entities to convey a governmental message, it may take legitimate and appropriate steps to ensure that its message is neither garbled nor distorted by the grantee") (quoting *Rosenberger*, 515 U.S. at 833). That authorities may exclude a person from teaching in the public schools based on citizenship, *Ambach v. Norwick*, 441 U.S. 68, 76 (1979), obviously does not define power to exclude a student on that ground. See *Plyler v. Doe*, 457 U.S. 202 (1982). Moreover, because school attendance (up to a certain age) is compulsory, a restriction is the equivalent of a mandate, rather than a condition on a benefit. See *Barnette*, 319 U.S. at 629 (noting interplay of flag salute requirement and attendance laws); *Earls*, 533 U.S. at 841 (Breyer, J., concurring) (noting that drug testing policy "preserve[d an] option for a conscientious objector").

Petitioners' contrary argument is a breathtaking reinterpretation of *Tinker* and *Fraser* – which are claimed to have together established that student speech may not be suppressed to quell controversy, but that the student may be punished for "undermining" the school's communication of a message important to its educational mission.[12] As the court below was quick to perceive, Petitioners' "undermining"/"mission" construct is a roundabout way of describing power to punish speech based on governmental disapproval or disagreement with the idea expressed, *i.e.*, "viewpoint discrimination."

So disambiguated, the claim that *Tinker* prohibited school authorities from suppressing discussion of controversial *topics* – but left the door open for suppressing speech expressing government-disfavored *viewpoints* (on matters "central" to the school) is simply untenable. It is a cardinal First Amendment principle that viewpoint-based restrictions are *more* suspect than those which apply even-handedly to all sides of an issue, *ACLU v. Mineta*, 319 F. Supp. 2d at 86 (a law aimed at "shield[ing] the nation's youth from *all* conversation regarding controlled substances" might have been permissible; one targeting only one side of the "dialogue regarding legislative reform of the narcotics laws"); see also *Velazquez*, 531 U.S. at 548-49 (otherwise discretionary "funding decision cannot be aimed at the suppression of ideas thought inimical to the Government's own interest"), and nothing in *Tinker* hints that things should be inverted inside the school gate. To be sure, *Tinker* held that public schools are not the kind of forum from which controversial speech may be excluded (absent "material[] and substantial disruption," 393 U.S. at 513), but it also squarely rejected that official disapproval could justify punishing a student speaker. *Id.* (A rule "forbidding * * *

[12]Petitioners and *Amici* include references to *Kuhlmeier* – and half-hearted suggestions that they punished Frederick to "disassociate" – the school from his banner, U.S. Br.17. But Frederick obviously did not claim that the "First Amendment require[d Petitioners] affirmatively to promote" his expression, 484 U.S. at 271, just to leave it alone.

expression by any student of opposition to [Vietnam War] would be an "obvious" constitutional violation).

Fraser picked up this central point, emphasizing that "[u]nlike the sanctions imposed on the students wearing armbands in *Tinker*, the penalties imposed in this case were unrelated to any political viewpoint." 478 U.S. at 685; see also *id.* at 689 (Blackmun, J., concurring) ("There is no suggestion that school officials attempted to regulate respondent's speech because they disagreed with the views he sought to express"). Indeed, almost every page of *Fraser* resonates with the general First Amendment rule that government may more freely regulate the time, place, and manner of protected speech, but not the idea expressed. See *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). See 478 U.S. at 683, 684 (school may limit the "terms" and "manner" of student speech in an assembly). But the Court approved the civility-promoting rules Thomas Jefferson drafted for congressional debate, see 478 U.S. at 681-82 (prohibiting "indecent" speech) – not the "gag rules" Congress imposed to assure that Nineteenth century critics of slavery could not be heard. See *supra*.[13]

The First Amendment problem with Petitioners' argument is not, as the decision below may have implied, that a school might define its "mission" too elastically, see U.S.Br.11 (arguing that "a school can conceive of its mission as involving not only the graduation of well-educated students, but students who have emerged from their K-12 years free from the scourge of illegal drugs"); or that prevention is not an "important" part of the high school curriculum," Pet.Br.9, but rather with its premise – that suppressing heterodox speech is a constitutionally permissible means for schools to get across even their most important messages. The viewpoint

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[13]It is likewise implausible to interpret *Fraser*'s reference to "offensive terms," 478 U.S. at 683, as repudiating the "bedrock" First Amendment bar to censoring "expression * * * because society finds the idea itself offensive," *Johnson*, 491 U.S. at 414.

discrimination discussed in *Tinker* was not condemned because it concerned a federal, rather than a Des Moines, matter (*i.e.*, the Vietnam War); it was condemned because it was viewpoint discrimination.

There are no shortage of cases explaining why government may not "interfere with speech for no better reason than promoting [its own] approved message," *Hurley*, 515 U.S. at 579; *Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976); *R.A.V.*, 505 U.S. at 396, and that principle's application to the public school environment was settled long before *Tinker* – in *Barnette*, a landmark decision Petitioners do not cite even once. The Court did not strike down the mandatory pledge law because it doubted the importance of the objectives pursued – "'national security'" and "'national unity,'"– 319 U.S. at 626, or that the Board of Education's decision to make recitation part of the school day was the kind of legitimate judgment it was authorized to make. Rather, the Court held that compulsory speech "was not a permissible means" of advancing that end, *id.* at 640.[14]

Though decided on general Due Process grounds, *Meyer v. Nebraska*, 262 U.S. 390 (1923), is to the same effect. It struck down a law prohibiting foreign language instruction not on account of doubts as to the legitimacy or educational importance of the measure's objective – graduating students fluent in English and thereby "prepared * * * to understand current discussions of civic matters" – but rather because that "desirable end cannot be promoted by [the] prohibited means" of limiting what else students could learn. *Id* at 403. See *Tinker*, 393 U.S. at 511 ("[S]tudents may not be regarded as closed-circuit recipients of only that which the State chooses to communicate. They may not be confined to the expression of

[14]In doing so, the Court explicitly acknowledged the "legislative judgment" recognized in *Minersville School Dist. v. Gobitis*, 310 U.S. 586, 599 (1940), that failure to punish the Witnesses "'might cast doubts in the minds of the other children which would themselves weaken the effect of the exercise.'" 319 U.S. at 635 n.16 (quoting 310 U.S. at 599).

those sentiments that are officially approved").

These decisions give no indication that a different rule holds as the curricular hard core of the "work of the schools," 393 U.S. 508, is approached. That school authorities have almost plenary power to make educational judgments as to what scientific principles are important for students to learn, cf. *Edwards v. Aguillard*, 482 U.S. 578 (1987), or whether and which foreign languages will be taught, *Meyer*, *Island Trees School Dist. v. Pico*, 457 U.S. 853 (1982), does not imply the power to prevent "undermining" such decisions by suppressing disagreement.

Nor do *Amici*'s efforts to conjure a mission beyond drug abuse prevention – to present censorship as inculcating "fundamental democratic values" – make for easy reading. The claim that "advocacy of unlawful conduct * * * strikes at the heart of a school's basic educational mission to teach 'fundamental democratic values'" because "our society depends on the willingness of its members to work to change objectionable laws, rather than simply violating them," U.S. Br.12, sits uncomfortably in a brief that elsewhere maintains that Frederick could have been punished for expressly advocating a legalization measure, *id.* 27. The notion that "respect for law" is advanced by punishing those who disagree with them is hardly a "democratic value," see *Whitney*, 274 U.S. at 377 (Brandeis, J.); and whether obedience to law is an unqualified duty is no easy question. See *Barnette*, 319 U.S. at 629 (vindicating claim grounded in belief "that the obligation imposed by law of God is superior to that of laws enacted by temporal government").

Presumably *Amicus* would not say that President Bush undermined the school district's message by lauding Rosa Parks's "defiance" of Montgomery's segregation laws, "as an act of personal courage [that] transformed America for the better," Address to Armed Forces Wives' Luncheon (Oct. 29, 2005); see *NAACP v. Alabama ex rel. Flowers*, 377 U.S. 288,

302 (1964) (rejecting effort to oust NAACP based partly on its "organizing, supporting and financing an illegal boycott'") – or that speaker at Fairbanks' recent Martin Luther King Jr. Holiday Youth Breakfast was interfering with public educators' mission when he told the students assembled about 15-year-old Claudette Clovin, whose earlier arrest for violating the same segregation law had inspired Rosa Parks's stand. See Friedenauer, "Inspired by an Unsung Hero," *Fairbanks News-Miner* (Jan. 21, 2007).

In fact, Alaska's State-adopted *Content and Performance Standards for Alaska Students* (2006), which "represent what Alaskans want students to know and be able to do as a result of their public schooling," *id.* at 2, suggest that public education does not have the mission imputed to it. Rather than exalt law obedience as a central value, the "government and citizenship" component suggests a vision more in line with *Barnette* than *Gobitis*, describing a well-educated young person as one who "recognize[s] the role of dissent in the American political system" and can "establish, explain, and apply criteria useful in evaluating rules and laws," *Id.* at 19-20.[15]

IV. Society's Unquestioned Interest in Curtailing Youth Drug Abuse Does Not Support The Punishment Imposed Here

A. The Suppression Here Bears No Real Relationship To Preventing Drug Abuse

In places, the submissions of Petitioners and *Amici* read like a plea for at least a de facto "special needs" exception to the First Amendment along the lines of the Fourth Amendment one recognized in *Earls*. In the context of the serious, intractable,

[15]The standards that relate most closely to drug abuse are phrased in less than dogmatic terms: Alaska expects high school graduates to "understand how the human body is affected by behaviors related to eating habits, physical fitness, personal hygiene, harmful substances, safety, and environmental conditions; and * * * * demonstrate an ability to make responsible decisions by discriminating among risks and by identifying consequences," *Id.* at 25.

and complex problem of youth drug abuse, this suggests, settled First Amendment rules – that "speech restrictions cannot be treated as simply another means that the government may use to achieve its ends," *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 512 (1996); that "the normal method of deterring unlawful conduct is to impose an appropriate punishment on the person who engages in it," *Bartnicki v. Vopper*, 532 U.S. 514, 529 (2001); and that "more speech, not enforced silence," is society's remedy, *Whitney*, 274 U.S. at 377 (Brandeis, J.) – fail to persuade, and *Barnette*'s concerns about the long-term effects of censorship are abstract.

While the force of such an appeal is understandable, the circumstances of this case only highlight why it must be rejected. First Amendment doctrine already recognizes that some government interests are compelling enough to suppress speech; but, recognizing claims of necessity will frequently (and sincerely) advanced and that the less tangible, but compelling benefits of free expression must be protected, it requires that those claiming compelling interests show that the repressive means will make a substantial difference. See *Barnette*, 319 U.S. at 636-37.[16]

What Petitioners defend here cannot possibly pass that test. Even accepting that a "Bong Hits 4 Jesus" banner on a public sidewalk can "lead to" youth drug abuse – premise that is both fanciful and fraught with First Amendment danger, the regime the Court is asked to uphold – one, as explained above, in which every other person present in the same public place could display a banner bearing a message identical to Frederick's, cannot stand. Comparable rules have been invalidated under First Amendment standards more deferential than those which govern here. See *Greater New Orleans*, 527 U.S. at 193.

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[16]The Court in that case rejected a claim of "national security" at a time of war, and the government purposes supporting measures struck down in *Lorillard*, *44 Liquormart*, and *R.A.V.* were extremely serious and compelling.

But saying only this much significantly *overstates* the efficacy of what Petitioners are defending. As they emphasize, banners are not the whole story: students are "bombarded with pro-drug messages from classmates, adults, and the media," Pet. Br. 27, and they get information from literature, political debate, parents and siblings; from their own experiences and observation of others. A student sitting at a personal computer can retrieve 22 million websites by typing in the word "marijuana" into a search engine – with those of the ONCDP and NORML among the first appearing. Whether government-maintained ignorance is an ideal, a policy that seeks to maintain a "closed circuit," is not an option. See *Bolger v. Youngs Drugs Prod. Corp.*, 463 U.S. 60, 73 & n. 26 (1983) (ban must be evaluated in light of likelihood that minors would have been exposed to similar "stimuli" from other sources).

Petitioners' exertions notwithstanding, the parallel here is not with *Earls*, but *Chandler v. Miller*, 520 U.S. 305, 322 (1997), which, after determining that the policy advanced no anti-drug purpose, apart from enhancing the State's "image [as] * * * committed to the struggle against drug abuse," held that Fourth Amendment privacy interests may not be "diminishe[d] for a symbol's sake," *id.*

B. Well-Intended Suppression of Students' Drug-Related Speech Is Inimical To The Asserted Prevention Interest

What has just been said is not an argument about the futility of prevention education, but rather about the futility of censorship. The relevance of the realities cited above realities is not limited to the legal question present here; they also critically affect how drug abuse prevention should be pursued. Given the inestimable seriousness of the problem of youth drug abuse, it must be common ground that what matters most is not the clarity of the message educators send youth, let alone the steadfastness conveyed to their parents or legislators, but rather the likelihood that the message will actually induce its audience to engage in less harmful behavior. As those who study

adolescent drug attitudes stress, strategies that deny the reality that students hear other messages, that they are intelligent and prone to cynicism, and that many have direct experience with drug use — and proceed from the assumption that teenagers will credit whatever they are told and therefore will be more deterred by an exaggerated harm message than an accurate one – cannot work. See Skager, *Beyond Zero Tolerance: A Reality-Based Approach to Drug Education and Student Assistance* 4-10 (2006). And, as noted above, reports of independent government evaluators confirm in depressing detail just how completely programs popular with parents and legislators have failed.

But this case is not about what educators should *say* – or what they may say – but rather what they can punish others for saying. And on this point, the case is even starker: those who craft and deliver the message *must know* what their intended audience actually thinks, knows, and believes about illegal drug use – whether these are grounded in fact or myth and even (especially) if attitudes are "pro-drug" or anti-authoritarian. There is no conceivable interest in having students tell school authorities what they want to hear, *i.e.*,"just *saying* no" – then doing otherwise.

Conclusion

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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